No. 2703

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

J. L. ALVERSON,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the District Court of the United States, Eastern District of Washington, Northern Division.

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ARGUMENT.

I.

Opposing counsel contend that the exceptions to the charge of the court, filed pursuant to the written stipulation signed by them, are insufficient to preserve the questions thereby sought to be raised.

We have long been cognizant of and have no quarrel with the decisions of this and other fed-

eral courts, rendered in the absence of any specific rule, to the effect that exceptions to a charge, in order to be available, must be made before the retirement of the jury to consider its verdict. These decisions, in consequence of rule 58 of the trial court (Revised rules of the U. S. Circuit Court and U. S. District Court of the District of Washington, p. 49) have no bearing whatever on the present controversy. Said rule is as follows:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

These rules were promulgated by the judges of this court in 1904, pursuant to Section 918, U. S. Revised Statutes (U. S. Comp. St., p. 685; 4 Fed. Ann., p. 585).

A certificate of adoption appearing on page 79 of the published rules is as follows:

> "ORDERED, That the foregoing rules be, and they are hereby adopted as the rules of the

Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Washington; that said rules take effect and be in force on and after Saturday, the 31st day of December, 1904; and that all rules heretofore adopted be repealed, said repeal to take effect on the day aforesaid.

Adopted....., 1904.

WILLIAM B. GILBERT,
ERSKINE M. ROSS,
WILLIAM W. MORROW,

United States Circuit Judges, for the Ninth Judicial Circuit."

While on page 81 of the same publication, we find the following:

"The Rules of the Circuit Court in and for the District of Washington, shall be the rules of practice governing the transaction of business in this Court; the admission of attorneys to practice; the conduct of the officers of the Court; the proceedings in actions at law, suits in equity and criminal prosecutions, and all other matters not otherwise provided for."

These rules, including rule 58, ever since their adoption, have been and now are the rules of practice and procedure in the District Court of Washington.

Mahr v. Union Pac., 140 Fed. 921, 925.

Section 918, U. S. Revised Statutes, is as follows:

> "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the making of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. (4 Fed. St. Ann. 585.)"

Rules of procedure adopted by the Circuit and District Courts in pursuance to the foregoing statute have the force and effect of law, unless inconsistent with the statutes of the United States or the rules of the Supreme Court.

> *Amer. Graphophone Co. v. Nat. Phonograph Co.,* 127 Fed. 350.
>
> *Bryant Bros. Co. v. Robinson,* 149 Fed. 321.
>
> *United States v. Barber Lumber Co.,* 169 Fed. 184.
>
> *Shepard v. Adams,* 168 U. S. 625.

Speaking not of rule 58, here involved, but of another one of the 98 rules adopted by this court at the same time, and distinguishing between the purpose and effect of Sections 914 and 918 of the Statutes, the late Judge Whitson, in the case of

Mahr v. Union Pac. R. Co., 140 Fed. 921, 925, said:

> "This is one of the rules adopted by the circuit judges of the Ninth Judicial Circuit upon December 31, 1904, and is and has been in force in this state (Washington) ever since. The argument is that Section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), which provides that the practice, pleadings, etc., in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and forms at the time in like causes in the courts of record of the state within which said Circuit or District Courts are held, must govern the court in this matter of practice. But there is no statute in this state regulating such appearance, nor is there any practice governing the matter other than that applicable wherever special appearances are allowed. Section 918 of the Revised Statutes (U. S. Comp. St. 1901, p. 685), expressly provides that the Circuit and District Courts may, in any manner not inconsistent with any law of the United States or any rule prescribed by the Supreme Court, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, 'and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in purpose of allowing rules to be made in cases similar to the one at bar, and so it has been held in numerous cases.'"

A question very similar to the one at bar, concerning the validity and effect of a rule of the Circuit Court for the Southern District of California,

requiring requests for special instructions to be presented to the court at the close of the evidence and calling for a construction of Section 918 of the Statute, was presented to this court in Atchison etc. Ry. Co. vs. Hamble, 177 Fed. 644, 652. Judge Morrow, in upholding the rule, said:

> "It is next contended that the court erred in refusing to receive and consider certain special instructions on behalf of the defendant; such refusal being based upon the ground that the requested instructions had not been handed to the court within the time provided in a rule of the court providing that:
>
> 'Any special charges or instructions asked for by either party must be presented to the court in writing directly after the close of the evidence and before any argument is made to the jury, or they will not be considered.'
>
> The requested instructions were not presented at the close of the evidence, but after the close of the argument and the court was about to instruct the jury. The Circuit Court has power to make such rules regulating its 'practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.' Rev. St., Sec. 918 (U. S. Comp. St., p. 685). The rule requiring instructions to be presented to the court at the close of the evidence and before argument is of that character."

Sustaining a rule providing that, if any execution against property be returned wholly or partly unsatisfied, the execution plaintiff might obtain *ex parte* an order for the examination of the execu-

tion defendant and such other persons as might be shown to be material, and further providing that, if deemed proper, on consideration of the evidence an execution be taken in accordance with the practice in respect to bills of discovery, the Circuit Court of Appeals for the Second Circuit took occasion in Walker vs. Monad, etc., 196 Fed. 206, to say:

> "The rule is an excellent one, and should be sustained if the District Court had the power to make it. Section 918 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 625) reads as follows: * * * Since we regard this new rule as being merely a regulation of practice in the court, which, if not absolutely necessary, is certainly convenient for the advancement of justice and the prevention of delays and it does not appear to be inconsistent with any provision of statute of any Supreme Court rule, we are satisfied that the District Court had teh power, under Section 918, to enact it." (196 Fed. 208.)

See also, *In re Kinney,* 202 Fed. 137.

It is not contended by defendant that there is any Federal Statute or rule of the Supreme Court prescribing the time and manner of taking exceptions to instructions, but simply, as is well known, that the practice of taking exceptions while the jury is still at the bar has grown up in this country in conformity with the Statute of Westminster 2. It does not seem therefore that any serious question could exist in regard to the validity of

the rule here presented, since Section 918 of the Statute provides that the Circuit and District Courts may make such rules and orders regulating their own practice as may be necessary or convenient, provided only that such rules be "not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court." The only question therefore is as to the interpretation and application of said rule to the case here presented.

In considering rule 58, it is to be noted, at the outset, that the taking of exceptions before the jury retires is thereby inferentially prohibited, since said rule specifically provides that exceptions "may be taken * * * after the jury have retired to consider of their verdict, and if practicable, before the verdict has been returned." Hence, it is clear, if the rule has any effect at all, that exceptions cannot be properly taken until after the jury has retired, and furthermore, that valid exceptions may be taken after a verdict has been returned, the time of taking exceptions being left optional and dependent entirely on considerations of practicability. The instructions here in question were given orally by the trial court. Opposing counsel do not contend that it was practicable to have entered exceptions before the return of the verdict, and by their stipulation in writing, they have for-

ever estopped themselves from asserting such a claim.

We quite agree with opposing counsel that it is never competent for parties litigant to direct the practice of a court in a channel violative of its own affirmative rules of procedure.

Here, however, rule 58 contemplates by its plain wording that exceptions to a charge may be taken after the return of a verdict. Counsel stipulated in writing filed in the case (Record, p. 57) that such exceptions might be filed at any time within thirty days, and exceptions filed in pursuance with such stipulation (Record, pp. 160-66) were set out in *haec verba* in the motion for a new trial (Record, p. 58), and the bill of exceptions certified by the trial court specifically states that plaintiff's exceptions were allowed (Record, p. 95). We, therefore, know that the errors now complained of in the instructions were called to the attention of the trial judge before the entry of final judgment, and that he was thus given an opportunity to rectify those errors by granting a new trial, instead of entering judgment on the verdict.

This is all that was necessary under the reformed procedure. State v. Peeples, 71 Wash. 451, 459; 129 Pac. 108, 112.

In principle the situation here is identical with

that presented by *In re* Chateaugay Ore & Iron Co., 128 U. S. 544.

In that case, amendments to a bill of exceptions, pursuant to a stipulation, were served and filed after the expiration of the period provided therefor by the rules of the Circuit Court. Objection was afterwards made to said amendments on the ground that they had not been served and filed within the prescribed period, in answer to which the Supreme Court of the United States, holding the parties estopped from objecting by their stipulation, said:

> "In the present case, the defendant prepared and served its bill of exceptions within the 40 days from January 25th. The expression 'prepare and serve,' in the order allowing the 40 days, clearly meant, in view of rules 67 and 69 of the Circuit Court, that the proposed bill was to be prepared and served on the opposite party within the 40 days, so that he might propose amendments to it within the time prescribed by the rules. It was so prepared and served within the 40 days. It was retained by the plaintiff for 10 days after its service. He then obtained, by stipulation, from the defendant, 10 days' more time to prepare and serve amendments. The proposed amendments were served on the tenth day, and the notice of settlement was accepted, written admission of its service was given, and it was retained. Under these and the other circumstances above detailed, we think the defendant was entirely regular in its practice, and that the plaintiff

was estopped from raising the objection which he made before Judge Shipman."

We, therefore, contend that the exceptions to the instructions here in question were taken and entered not only within the time contemplated by rule 58 and the written stipulation of the parties, but also that defendant, by reason of said stipulation, is at this time estopped from making objection.

Furthermore, in view of rule 58, counsel for defendant committed error in stating his exceptions to the charge of the court in the presence of the jury, and before it had retired, as page 91 of the record discloses was done. Mr. Plummer, of attorneys for the plaintiff, was on the other hand, entirely within the rule in answering, "I don't think of anything, Your Honor," in response to an inquiry of the Court, since he was forbidden by the rule referred to from taking exceptions at that time.

II.

Rule eleven of this Court provides, "but the Court, at its option, may notice a plain error not assigned."

While we do not find that this rule has been construed by this Court in connection with a failure to take proper exceptions to instructions, yet it has been so considered in other jurisdictions, and held

to authorize and justify the consideration on appeal or error of a "plain error" in the charge to the jury, though not excepted to in the lower court.

This identical proposition appears to have been presented to the Circuit Court of Appeals for the Fourth District in Western North Carolina Land Co. v. Scaife, 80 Fed. 352, 357, where it is said:

> "* * * we are of the opinion that the case is one which would with propriety justify, and should in justice require, this court to exercise that discretion which its eleventh rule allows in its concluding words, "but the court, at its option, may notice a plain error not assigned.' So, even if we were in doubt whether the exceptions did in due form assign the errors complained of, we would feel ourselves impelled to exercis that option, which is to be rarely and reluctantly invoked, and notice the plain errors and omissions in the charge of the presiding judge."

And the same ruling was made by the Circuit Court of Appeals in White v. United States, 202 Fed. 501, the precise question being that the lower court omitted to instruct the jury as to their duty to allow or not to allow interest.

To the same effect see:

San Antonio Tract Co. v. Yost, 88 S. W. 428.

Hopper v. Dodd, 70 S. W. 223.

Evants v. Erdman, 153 S. W. 229.

We, therefore, contend, though it be conceded for

the sake of argument that proper exceptions to the instructions complained of were not taken below, that the error of the trial court in submitting to the jury the question of whether or not Alverson breached or abandoned his contract, in the face of paragraph four thereof specifically requiring the giving of a written notice ten days in advance as a condition precedent to cancellation and the letting of the work to third parties, is error so obvious and fundamental that it should be noticed and corrected by this court in the furtherance of justice, even though it be held that no proper exceptions were taken below. This is especially true in view of rule 58, which, though it be not construed to authorize the filing of exceptions after the return of a verdict, even when stipulated for by the parties, must nevertheless be conceded to be so worded as to lead the average practitioner to believe, in the absence of a contrary judicial interpretation, that all rights would be preserved by the practice followed in the present instance.

III.

Defendant's contention that paragraph four of Alverson's contract was not called to the attention of, or considered by the lower court, and that it cannot now be considered in this court because no instruction based thereon was given or asked in the trial below, is wholly without merit.

Said paragraph four was a prominent and important part of the contract on which this action is predicated, and the whole contract was at all times before the trial court. Said paragraph speaks for itself. The language is clear and does not call for the giving of a specific instruction, though it is of controlling importance in that it specifies certain conditions to be performed by the defendant precedent to a declaration of forfeiture. Hence the court erred in submitting the question of abandonment and forfeiture to the jury, since those conditions were not performed by the defendant. In other words, said paragraph four conclusively shows that the court erred in giving the instructions excepted to, the giving of which are now urged as grounds for reversal.

Equally without merit is the contention that the method prescribed by paragraph four for the cancellation and forfeiture of the contract for cause, was not required to be followed in this instance, because Alverson had never been permitted to begin work. The argument of opposing counsel proceeds, in the first place, on the erroneous assumption that Alverson refused to proceed with the work, a contention which we absolutely deny, and which is not borne out by the record.

Secondly, even though defendant's contention could by any stretch of construction be held to be good, yet such refusal by Alverson to proceed is

one of the very conditions indicated by paragraph four as calling for the giving of the notice therein prescribed, and the doing of the things therein provided preliminary to cancellation, and as conditions precedent to the employment of "other parties to complete said work or any part thereof."

The wording of said paragraph shows that the parties to the contract appreciated the ever present possibility of differences arising concerning its construction and the measure of the rights and duties of the respective parties thereunder, and with that possibility in view, provided for the giving of a written notice ten days in advance, in order that the contractor might have an opportunity to reflect and reconsider before determining on a definite course of action. The wording of this provision of the contract of itself, and without the aid of the general rule of law that a breach is not committed by an erroneous construction and a claim of more than the contract gives, prevents a declaration of forfeiture in advance of the time for performance by the giving of a ten-day notice that the work must proceed in accordance with the demands of the railroad company. In other words, said paragraph four establishes as clearly as can be expressed by the English language that the railroad company could in no event declare a forfeiture until an opportunity for performance had been extended to the contractor.

IV.

The central allegation of the complaint, consistently maintained through the reply, is that the defendant refused to permit the plaintiff to perform his contract after having recognized the rights of the plaintiff and after having repeatedly promised to permit him to do the work when the time for performance should arrive. Notwithstanding this, a detached statement from the reply is quoted on page 3 of the opposing brief with the contention that the plaintiff thereby admitted that he had refused to perform his contract though offered an opportunity so to do. The excerpt quoted is taken from the reply to paragraph seven of the third affirmative defense and only needs to be read in connection with the remainder of the paragraph and the entire allegation to which it refers to show the absurdity of defendant's contention. The obvious meaning of the language quoted, when considered in connection with the remainder of the paragraph from which it is taken and the allegation to which it refers, is that the railroad recognized the privity of contract existing between it and the plaintiff and offered to allow the plaintiff to do the work when defendant might become ready to proceed with its operations.

It must also be borne in mind that the defendant railroad company is not the moving or complaining party in this Court, nor has it made any coun-

ter assignment of errors; hence, it cannot now be heard to make an affirmative attack on the pleadings. This is especially true since the point was in nowise suggested to the lower court.

Defendants would also make it appear that Alverson, by going to Canada in the summer of 1912, evinced a purpose to abandon his contract. In fact, the contention seems to be that Alverson breached his contract by the mere act of going across the international boundary line into Canada, though the defendant had no use for his services at that time. Alverson testified at considerable length, both on direct and cross examination, in regard to his trip to Canada, emphasizing the fact that he remained at all times in close touch with the railroad officials and was ready to return for the purpose of starting the work whenever notified so to do. While the court will, of course, read all the testimony on this point, the gist appears from the following:

> "They kept me waiting around for over a year, with my outfit, and I called numerous times, I cannot tell just how many, but every week or so I would inquire about when the work would be ready, and was always told by Mr. Pittman that they were getting ready as fast as possible, and I would be informed in due time, so I could go ahead with the work. * * * I waited around a number of months, and then I had some work in Canada I could do, so I moved part of my outfit up there, but kept in communication with Mr. Pittman

through my father-in-law, Mr. J. Z. Moore, and was ready to come down and go right to work on the contract, when I was informed that the work was ready. A number of months afterwards, Mr. Pittman was replaced as chief engineer in charge of the work by Mr. Holman, and the company, without consulting me, or making any arrangements with me, let the work be done by contract to Twohy Brothers." (Record 70, 71.)

Mr. Alverson's father-in-law, Judge J. Z. Moore, testified that, representing Alverson, he frequently called at Mr. Pittman's office during Alverson's absence and was always told that Alverson would be given timely notice, and an opportunity to go ahead with the work when the railroad should be ready. Judge Moore testified:

"When Alverson went to Canada to do some work there, he instructed me to confer frequently with Mr. Pittman, the chief engineer of the defendant, as to when the work, which is the subject matter of this controversy, would be ready to be performed by Alverson under his contract, and that immediately upon receiving notice, he would come down and go ahead with the contract. In pursuance with said request on the part of Alverson, I called frequently at the offices of the company and conferred with Mr. Pittman, the chief engineer, Mr. Pittman informed me at all times that Alverson was to go ahead with the work when they were ready; that he could not tell just when the work would be ready, but that he would let me know, so I could inform Alverson. I made these visits to Mr. Pittman and

> conferred with him every few days during all of the time Alverson was in Canada." (Record 84,85.)

The statement on page 20 of appellant's brief to the effect that Alverson, on the witness stand, boasted of his conduct (the conduct which defendants claimed constituted a breach), is entirely unjustified. A perusal of Alverson's testimony will show that he made a calm, frank and full statement of his relations with Mr. Pittman and Mr. Holman, the railroad representatives, and related briefly, in response to the interrogations of the attorneys, his interpretation of the contract and his rights thereunder. A witness in court is expected to narrate facts, but he is not called upon to make a confession of mistaken judgment or to enter a plea for forgiveness as defendant seems to contend.

The undisputed testimony of Alverson and witness Moore, who testified on his behalf, shows that the railroad officials did not consider that Alverson had abandoned his contract, since they continued to assure that he would be given an opportunity to perform long after the discussions concerning sand and gravel and right up to the time the work was finally let to other parties. The fact that notice of cancellation was not given as required by paragraph four of the contract of itself makes it clear that the defendant did not consider

that plaintiff had abandoned or given ground for cancellation of the agreement.

Lack of time forbids analysis and discussion of defendant's authorities, and, since the conclusions of the Court will be based in any event on its own investigation of the law, we must content ourselves with the confident assertion that, on consideration, the citations in our opening brief will be found to fully support and establish the correctness of the contentions there advanced.

Respectfully submitted,

PLUMMER & LAVIN, *and*
O. C. MOORE,

Attorneys for Plaintiff in Error.